SUPREME COURT, U. S.

SEP 4 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 654

TIDEE PRODUCTS, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 18, 1970.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 174 NLRB No. 103 and is printed in Appendix B, *infra*, pp. 2a-4a. The judgment and opinion of the Court of Appeals are not yet officially reported and are printed in Appendix B, *infra*, pp. 46a-70a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on April 3 and May 18, 1970, respectively. Appendix B, *infra*, pp. 46a-70a. Rehearing was denied on July 10, 1970. Appendix B, *infra*, p. 72a. Petitioner's Motion for leave to File Second Petition for Rehearing (Appendix B, *infra*, pp. 75a-76a) is presently pending before the court. Issuance of the mandate was stayed by order of the Court of Appeals for a period of 30 days from August 7, 1970. Appendix B, *infra*, p. 74a. The jurisdiction of this Court is now invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

If the National Labor Relations Board is without the remedial power to "compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement" (*H. K. Porter Company* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821 (March 2, 1970)), may the Board nevertheless award damages upon the contractual provisions that it speculates the parties would have agreed to had they entered into a collective bargaining agreement?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.*), which are involved in this case are set forth in Appendix A. For the convenience of the Court, however, the pertinent provisions of Section 8(d) of the Act are set forth below:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation

> of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . ." (Emphasis added.)

STATEMENT OF THE CASE

The judgment and opinion, of which review by this Court is now sought, was part of a consolidated decision by the Court of Appeals. In the portion *not* here involved (Case No. 22,911), the court enforced an order of the National Labor Relations Board (hereinafter referred to as the "Board") finding that Tiidee Products, Inc. (hereinafter referred to as the "Company") had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act. The violation of Section 8(a)(5) consisted of an improper refusal to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter referred to as the "Union").[1] This violation was remedied by the Board through an order requiring the Company to cease and desist from such unlawful conduct, to bargain with the Union, to post an appropriate notice and to engage in other affirmative acts designed to correct the Company's unfair labor practices. In addition, the Board also issued a so-called "broad order" forbidding the Company from "in any other manner interfering with, restraining or coercing its employees in the exercise of the

1. The refusal to bargain originated in the Company's initial belief—not subsequently urged before the Court of Appeals—that the Board's Regional Director had acted improperly in overruling the Company's objections to the Union's election victory. Appendix B, *infra*, pp. 7a-11a. A refusal to bargain constituted the *only* means by which the Company could obtain judicial review of the Regional Director's decision. See, e.g., *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481 (1964).

rights guaranteed them by Section 7 of the Act". Appendix B, *infra*, pp. 4a, 39a-45a. The Company has agreed to comply with this order of the Board. Appendix B, *infra*, pp. 77a-78a.

The Union, however, requested still additional relief for the Company's 8(a)(5) violation in the form of a further order requiring the Company to make payments to its employees and to the Union based upon speculative assumptions that (1) a collective bargaining agreement would have been consummated, (2) that such a contract would have been consummated at a certain fixed date from certification of the Union's election victory, and (3) that the agreement would have contained certain specific terms and conditions. The Board Trial Examiner refused to recommend this so-called "make-whole" claim, and the Board affirmed his findings and recommendations and denied the Union's request in its entirety. Appendix B, *infra*, pp. 2a-4a, 37a-39a.

The present case (Case No. 22,797 below) arises out of the Union's petition to obtain the additional relief which the Board declined to grant. One significant authority urged on behalf of this position was the decision of the Court of Appeals for the District of Columbia in *United Steelworkers of America* v. *N. L. R. B. (H. K. Porter Company)*, 389 F. 2d 295 (1967). Union's Brief in the Court of Appeals, p. 10. Although in the interval between oral argument and decision this Court reversed the Appellate Court's decision in *Porter*, the Court of Appeals, Circuit Judge MacKinnon dissenting, nevertheless concluded that "the Union makes a substantial contention"; that notwithstanding *Porter* and Section 8(d) of the Act, "damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer has not yet entered into the contract"; and that the Union's petition

for additional relief should therefore be remanded to the Board "for further proceedings not inconsistent with this opinion." Appendix B, *infra*, pp. 52a, 62a.

The Company was subsequently made a party intervenor in the present case (Appendix B, *infra*, p. 71a) and submitted a petition for rehearing, and suggestion for rehearing *en banc*, attacking the Court of Appeals' findings on the basis, *inter alia*, of its lack of opportunity to even argue *Porter*. The petition, supported by an *amicus* brief filed on behalf of The Chamber of Commerce of the United States of America, was denied, Circuit Judge MacKinnon again dissenting, on July 10, 1970 and counsel for the Company was simultaneously informed that a majority of the Judges of the court were not in favor of having the case heard *en banc*. Appendix B, *infra*, pp. 73a.

Thereafter, in a decision dated August 25, 1970 and made public on August 29, 1970, the National Labor Relations Board issued its landmark opinion in *Ex-Cell-O Corporation*, 185 NLRB No. 20; *appeal docketed sub. nom. Automobile Workers* v. *NLRB*, No. 24577, D. C. Cir., August 26, 1970. Appendix C, *infra*. In that case the Board expressly disagreed with the decision below and concluded that, by virtue of *Porter* and Section 8(d) of the Act, it had no power under any circumstances to grant the additional 8(a)(5) relief sought by the Union herein. On the basis thereof the Company immediately filed with the Court of Appeals a Motion for Leave to File Second Petition for Rehearing and for Enlargement of Time to File Petition for Rehearing. Appendix B, *infra*, pp. 75a-76a. This motion is presently pending before the court.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Creates a Severe Dislocation in the Administration of the National Labor Relations Act.

The decision of the Court of Appeals sanctions the Union's requested "make-whole" relief and instructs the Board to enter an order "not inconsistent" with the court's opinion. Appendix B, *infra*, p. 62a. The Board, however, has already determined that such a remedy is inappropriate here[2] and that, *in any case*, with "due respect for the opinion of the Court of Appeals . . . as the law now stands, [such a] proposed remedy is a matter for Congress, not the Board." *Ex-Cell-O Corporation*, 185 NLRB No. 20; *appeal docketed sub. nom. Automobile Workers* v. *NLRB*, No. 24577, D. C. Cir., August 26, 1970. Appendix C, *infra*, pp. 86a-89a. The court, in effect, thus continues to insist that the Board utilize a purported "make-whole" power although the Board has concluded that both Congress and this Court have precluded the imposition of such a remedy.

Such a severe dislocation in the administration of the Act warrants resolution by this Court. The instant case is only a precursor of other decisions by the District of Columbia Circuit. Review of the Board's *Ex-Cell-O* opinion by that Court was immediately sought by the union there involved. Case No. 24577, D. C. Cir., August 26, 1970. Other allegedly aggrieved unions that have failed to obtain a "make-whole" remedy before the Board will

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2: Appendix B, *infra*, pp. 2a-4a, 37a-39a. The Board here has consistently opposed the issuance of any additional remedies and insisted instead "that where the Board declines to afford a remedy other than what it traditionally grants, the refusal constitutes a determination that the facts of a particular case do not warrant it, and no further explanation is required". Brief of NLRB to the Court of Appeals, pp. 37-38.

similarly continue to reassert such claims before that Circuit,[3] regardless of *any* disposition by the Board on remand here, until this Court alleviates the impasse that exists between the Board and the court below.[4]

This attempt to procure judicial approval of remedial provisions which the Board has declined to grant flies in the face of this Court's declarations that the Board's choice of remedy must "be given special respect by reviewing courts" (*NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 612 at n. 32 (1969)) and that "as with the Board's other remedies, the power to order backpay 'is for the Board to wield, not for the courts' ". *NLRB* v. *J. H. Rutter-Rex Manufacturing Company*, 396 U. S. 258, 90 S. Ct. 417, 420 (1969), quoting *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). Surely such admonitions are particularly apropos where, as here, the underlying violation of the Act involves the only means whereby the employer can obtain appellate review of a Board representation case decision. As the Board observed in *Ex-Cell-O* (Appendix C, *infra*, p. 85a), the remedy sanctioned by the decision below has the practical effect of eliminating many employers' right to obtain court review of such Board determinations; the employer is confronted with the Scylla and Charybdis choice of either accepting without question such a Board ruling or incurring the risk of a speculative and

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3. Section 10(f) of the Act provides, in part, that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . ."

4. See, e.g., *Local No. 347, Amalgamated Meat Cutters* v. *NLRB (Heck's, Inc.)*, . . . F. 2d . . . , 74 LRRM 2109 (D. C. Cir., 1970), where the Circuit remanded to the Board another case to consider, in view of its decision in the present case, a "make-whole" remedy. Cf. *Steelworkers* v. *NLRB (Quality Rubber Mfg. Co., Inc.)*, . . . F. 2d . . . , 74 LRRM 2747 (D. C. Cir., 1970).

oppressive penalty for invoking his only available judicial recourse.[5]

Moreover, a remand of the present case serves no useful purpose and operates to the substantial detriment of Petitioner. If the Board has no authority *whatsoever* to grant a "make-whole" remedy, how can it proceed in accord with the decision below which approves such a remedy? And what obligation can there be, particularly after *Ex-Cell-O*, for the Board to provide the court with a "satisfactory justification for its order" and an explanation of "what basis it could or did conclude that its order . . . is designed 'to insure meaningful bargaining'" (Appendix B, *infra*, pp. 52a, 53a)? In sum, upon remand, if the Board is to be consistent with *Ex-Cell-O*, it will necessarily have to disagree, in substantial part, with the Circuit's views on the critical questions here involved. Recourse will then again be sought to the Court of Appeals and ultimately to this Court with little intervening illuminating assistance. There will be a repetition of the unhappy judicial history of *Porter*. Such expensive and time-consuming litigation, and "unnecessary duplication of proceedings", is anathema to the purpose of judicial review of securing "a just result with a minimum of technical requirements". *United Automobile Workers* v. *Scofield*, 382 U. S. 205, 212 (1965). The instant matter is now

5. Little solace can be gained for the decision below by that Court's conclusion that review of the Board representation decision here was totally unwarranted. "Lawsuits", as this Court noted in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-2 (1938): ". . . often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." If the inevitable delays attendant in a review proceeding suspend for a time employees' enjoyment of some of their statutory rights, "it is . . . obvious that Congress explicitly intended to impose precisely such delays." *Boire* v. *Greyhound Corp.*, *supra*, 376 U. S. at 477-8; *American Federation of Labor* v. *NLRB*, 308 U. S. 401, 409-12 (1940).

in an appropriate posture for this Court to provide the necessary guidance for the court below, and other courts of appeal, on the legitimate scope of the Board's remedial powers.

2. The Decision Below Is in Conflict With This Court's Decision in Porter.

In the present case, as in *Porter*, the remedy sought is one which has never previously been granted in the thirty-five year history of the Act. The reason is apparent: such a sanction would sharply erode the fundamental premise of freedom of contract upon which our national labor policy is grounded. *Porter*, 90 S. Ct. at 826. For if the Board has the power to award damages against an employer based upon a determination of what that employer "*would have* agreed to if [he] had engaged in . . . [proper] collective bargaining" (Appendix B, *infra*, p. 61a; Emphasis added), it also has the power to determine, in numerous other contexts, the outcome of collective bargaining.[6] It is precisely this governmental power to "impose its own views of a desirable settlement", to "directly or indirectly . . . sit in judgment upon the substantive terms of collective bargaining agreements", and to "compel agreement

6. A "make-whole" remedy would necessarily involve the Board in an intricate analysis of the bargaining positions of the parties and a concomitant regulation of contractual terms and conditions. See, e.g., "the methods for measuring loss" discussed by the Board dissenters in *Ex-Cell-O*. Appendix C, *infra*, pp. 115a-118a. As Professor St. Antoine observed:

> "As a practical matter, [a "make-whole" remedy] . . . would in all likelihood tend to have a significant impact on the terms of any contract subsequently negotiated by the parties. The union will inevitably want to regard the scale by which the 'make-whole' award was calculated as its 'floor' in bargaining."

St. Antoine, *A Touchstone for Labor Remedies*, 14 Wayne L. Rev. 1039, 1054 (1968), cited with approval by the court below. Appendix B, *infra*, pp. 56a, 59a.

when the parties themselves are unable to do so", which *Porter* expressly barred. *Porter*, 90 S. Ct. at 826.

If the Board was without the authority in *Porter* to compel a "recalcitrant" employer to accept a single and definite contractual provision, where the circumstances of the case indicated that such a clause would almost certainly have been obtained but for the employer's unlawful conduct, it is surely also without the authority in the present case to predicate damages on the benefits that allegedly would have resulted from collective bargaining. Awarding damages "on an assessment of the contract terms that would have been in effect" (Appendix B, *infra*, p. 62a) necessarily presumes, as the Board observed in *Ex-Cell-O*, that "a contract would have resulted from bargaining. The fact that the contract, so to speak, is 'written in the air' does not diminish its financial impact upon the recalcitrant employer, who, willy nilly, is forced to accede to terms never mutually established by the parties. Despite the admonition of the Supreme Court . . . one of the parties under this remedy is forced by the Government to submit to the other side's demands." Appendix C, *infra*, p. 88a.

3. The Decision Below Is in Conflict With the Intent of Congress.

"A sanction for refusal to bargain," Judge Friendly observed in *Cooper Thermometer v. N. L. R. B.*, 376 F. 2d 684, 690 (2nd Cir. 1967), "that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of that sort would give insufficient respect to Congress' direction in Sec. 8(d) that the obligation to bargain does not compel either party to agree to a proposal or require the making of a concession."

Such an improper sanction has been approved by the decision below. The remedy which the Court of Appeals would permit disregards both the remarks of Senator Taft

during the Congressional debates on the Taft Hartley amendments to the Act ("Under the bill there is a kind of injunctive remedy through the National Labor Relations Board, *but there is no possibility of a suit for damages* . . . it is not felt . . . that the Labor Board is an effective tribunal for the purposes of trying to assess damages in such a case" 93 Cong. Rec. 1858 (1947) (Emphasis added)) and the observations of this Court in *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656, 665 (1954) ("The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay"). In short, as Judge MacKinnon noted in his dissent, "[t]he power the majority opinion seeks to have the Board apply has been expressly withheld by Congress." Appendix B, *infra*, pp. 68a-69a.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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CITATIONS.

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

On September 4, 1970, Petitioner filed with this Court its Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 3 and May 18, 1970, respectively. The Petition was filed at that time so that issuance of the mandate, which had been stayed by order of the Circuit Court only for a period of 30 days from August 7, 1970 (Appendices to Petition, p. 74a), would be further stayed under Rule 41(b), Federal Rules of Appellate Procedure.

At the time the Petition was filed, as noted therein (pp. 2, 5), there was pending before the Court of Appeals

Petitioner's Motion of September 1, 1970 for Leave to File Second Petition for Rehearing (Appendices to Petition, p. 75a) predicated upon the Board's decision, made public August 29, 1970, in *Ex-Cell-O Corporation*, 185 NLRB No. 20, *appeal docketed sub. nom. Automobile Workers* v. *NLRB*, No. 24577,[1] D. C. Cir., August 26, 1970 (Appendices to Petition, pp. 79a-120a).

By an order dated September 21, 1970, appended hereto, the Circuit Court, Circuit Judge MacKinnon dissenting, has now denied Petitioner's Motion. This order has a number of significant implications with respect to the instant Petition:

1. The Court of Appeals' order directly invites a Supreme Court resolution on the conflict between the decision below and *Ex-Cell-O*. Thus, the court declines to recall its decision, notwithstanding its recognition that the Board has now expressly considered the precise issue involved in that decision and reached a contrary interpretation of the law, on the ground that "[t]he question whether this court was in error has been presented to the Supreme Court".

2. The Court of Appeals' order underscores the severe dislocation in the administration of the National Labor Relations Act effected by the decision below. See Petition, pp. 6-8. Thus, while the court is cognizant that *Ex-Cell-O* "sets forth the Board's view of the legal question passed upon by this court, concerning the extent of its authority, and concludes that this court was in error", it nevertheless refuses to regard that decision as "the kind of supplementary finding contemplated by our opinion of April 3, 1970, in this cause . . ." The Board's decision in *Ex-Cell-O*, however, is manifestly tantamount to such a "supplementary

1. Counsel for the Board similarly directed the Court's attention to *Ex-Cell-O*, by letter dated September 2, 1970 appended hereto, noting that the decision in that case "bears directly on the issue of additional remedy requested by the Union herein . . ."

finding"; it carefully analyzes the decision of the Circuit Court and finds it to be "in error". The only basis upon which it cannot be considered the equivalent of a Board decision on remand here, it is submitted, is the Court of Appeals' refusal to accept the Board's position in *Ex-Cell-O*.

3. The Court of Appeals' order also magnifies the absence of any useful purpose in a remand of the present case to the Board. See Petition, pp. 8-9. Thus, the court emphasizes that its remand contemplates "further consideration by the Board in the light of our ruling that the Board had lawful authority to provide make-whole remedies", specifically disregarding the Board's clear determination in *Ex-Cell-O* that *under no circumstances* did it have such "authority". A remand, therefore, is merely an expensive and time-consuming futility which only postpones the necessary resolution by this Court of the important and far-reaching issues raised by the present case.

Respectfully submitted,

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APPENDIX

Order of the United States Court of Appeals for the District of Columbia Circuit Entered September 21, 1970.

Before: LEVENTHAL, ROBINSON, and MACKINNON, *Circuit Judges*, in Chambers.

ORDER.

Upon consideration of petition for rehearing, for tolling of time for stay of issuance of mandate, and for leave to file a second petition for rehearing and for enlargement of time to file intervenor's motion filed September 1, 1970, and the court being advised that a petition for certiorari has been filed by intervenor, it is

ORDERED that intervenor's aforesaid motions are denied. These motions seek to bring before the court the decision of the National Labor Relations Board in Ex-Cell-O Corp., 185 NLRB No. 20 made public August 29, 1970. That opinion is not the kind of supplementary finding contemplated by our opinion of April 3, 1970, in this cause, which remanded for further consideration by the Board in the light of our ruling that the Board had lawful authority to provide make-whole remedies. The Board's Ex-Cell-O decision in effect sets forth the Board's view of the legal question passed upon by this court, concerning the extent of its authority, and concludes that this court was in error. The question whether this court was in error has been presented to the Supreme Court. The court concludes that its opinion should not be recalled. There is no need for this